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In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II,

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO.

BRIEF OF PETITIONER.

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BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the Supreme Court of Ohio is reported in 172 Ohio State, at page 269. (R. 63.) The opinion of the Ohio Court of Appeals is unreported. (R. 48.) It can be found at 47 L. R. R. M. 2230.

JURISDICTION.

The judgment of The Supreme Court of Ohio was entered as of May 17, 1961. (R. 61.) There was no motion for rehearing.

A petition for a writ of certiorari to the Supreme Court of Ohio was docketed in this Court on August 14, 1961. The petition for certiorari was granted on November 6, 1961. (R. 71.) This Court's jurisdiction rests on 28 U. S. C. Sec. 1257 (3), inasmuch as the Ohio Courts have denied petitioner rights and privileges under federal statutes and have also denied rights and claims of the petitioner guaranteed under the Constitution of the United States.

QUESTIONS PRESENTED.

May a state court circumvent the supremacy clause of the federal constitution by the device of issuing an ex parte temporary injunction in a labor dispute affecting interstate commerce preventing a labor organization from engaging in activities protected by the Labor-Management Relations Act and then summarily refusing to set or hold a hearing on the question of the jurisdiction of the court over the subject matter of the action and punishing the union's lawyer for advising his client that the court acted beyond its jurisdiction in granting the injunction?

May a state court issue an ex parte temporary injunction prohibiting peaceful picketing in a labor dispute affecting interstate commerce solely on the basis of a petition which does not allege acts of violence or conduct likely to produce violence, mass picketing, threats, intimidation, any kind of disorder or breach of the peace arising from the picketing of the employer's premises, but alleges only a conclusion that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff's company and irreparable loss and damage to property of the plaintiff's company and that the plaintiff has no adequate remedy at law"?

Is a lawyer who in good faith advises his client that a state court was without jurisdiction to issue an ex parte injunction prohibiting peaceful picketing by employees at the premises of an employer engaged in interstate commerce, denied due process of law and equal protection of the laws by the refusal of the trial court to grant him a trial or permit him to give testimony, call witnesses, or otherwise answer a written charge of *indirect* contempt lodged against him *by the trial Judge* for giving such advice?

Is an attorney denied due process of law when he is convicted of contempt of court for proffering good faith advice to his clients that a violation of an ex parte temporary injunction provided a means of testing the jurisdiction of the state court over the subject matter?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

The constitutional provisions involved are that portion of Section 1 of the 14th Amendment to the Constitution of the United States which reads as follows:

> "* * *; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

And that portion of Article VI of the United States Constitution which reads as follows:

> "* * * This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in Constitution or Laws of any State to the Contrary notwithstanding."

The statutory provisions involved in this case are those contained in Sections 7 and 8 (157 and 158) of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C. A. 141 et seq., and that portion of Section 10 (a) (160) of the Act which reads as follows:

> "The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *"

STATEMENT OF THE CASE.

1. Petitioner Cited for Indirect Contempt for Advising Client.

The petitioner is a young Toledo lawyer, a member of the Bar of Ohio. He was cited for an indirect contempt of court and was sentenced to a term in jail and to pay a fine without being afforded a hearing or trial.

The charges of contempt arose out of the petitioner advising the regional counsel of a labor union that an ex parte temporary injunction issued by a Judge of the Court of Common Pleas of Lucas County, Ohio, was, in his opinion, a nullity for the reason that the state court did not have jurisdiction over the subject matter of the action and that, in view of the adamant refusal of the issuing court to grant a hearing, the order could be tested quickly on an application to a higher court for a writ of habeas corpus if picketing continued and the pickets were held in contempt by reason thereof.

The charges of indirect contempt were filed against the petitioner on June 6, 1960 (R. 29). This was several days after the court had pronounced the petitioner to be in contempt during the process of a contempt hearing which involved *only* union officers for violation of a temporary injunction. (R. 25, 28.)

On the day *prior* to the first contempt hearing (the hearing at which the petitioner and his clients were found guilty of contempt although no citation or charge in contempt had been issued for the petitioner), the petitioner, *at the suggestion of his opposing counsel and with full knowledge of the Court*, agreed to submit his clients to the court to be dealt with on contempt. At that time he stated that he "would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings." (R. 43, 57, 70.)

The petitioner was not a respondent or otherwise a party at the contempt hearings on June 1st or June 3rd but was serving as counsel for the officers of the local union who were produced in court pursuant to the agreement (R. 16, 17, 70.)

These background facts are pertinent:

Friday, May 27, 1960, was the Friday before the Memorial Day holiday, which fell on Monday.

That morning the petitioner was retained by the International Longshoreman's Association, a labor organization having a regional headquarters in Chicago, to represent the local union in Toledo. (R. 36.) Its members were involved in a labor dispute with the Toledo Marine Terminal, Inc. The members, employees of the Terminal Company, were then engaged in peaceful picketing of the premises of the employer. (R. 2.)

2. Ex Parte Injunction Prohibits Peaceful Picketing.

There is no dispute that the employer was engaged in interstate commerce and that the picketing by the union members was in all respects orderly and peaceful. (R. 2, 5.) [1]

Upon being retained, the petitioner contacted Robert Ragan, counsel for the Toledo Marine Terminal, Inc. to advise him that he was representing the union. (R. 36.)

That afternoon the petitioner was notified, *not by counsel* but by the court clerk's office, that an action for

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[1] Judge Younger at the start of his Ohio Court of Appeals dissenting opinion said (R. 55):

"It is admitted by all parties here that the plaintiff in the case in which this contempt proceeding arises, The Toledo Marine Terminal, Inc., is engaged in interstate commerce and that the picketing by the defendant members of the International Longshoremen's Association was entirely peaceful and non-violent."

injunction had been filed and had been assigned to Judge McCabe. The petitioner immediately talked to Judge McCabe by phone. He informed Judge McCabe that he represented the union and that if a request was made for an immediate injunction, he would be available for a hearing upon a moment's notice and requested to be called in such an event. *He was assured that he would be called if such a request was made.* (R. 23, 37.)

He waited in his office for such a call. *None came from the Judge or from opposing counsel.* Instead, he learned later from a call by a courthouse employee that a temporary injunction had been issued. (R. 38.)

Upon hearing of this unexpected, if not strange, turn of events, the petitioner and his associate met with the court in chambers. The following is a portion of the record of what then took place. (R. 38. Undisputed sworn testimony given Court of Appeals at Habeas Corpus hearing):

> "* * * I told him I would like to have a hearing on the issuance of the restraining order. *He said definitely and flatly that I was not going to have a hearing,* that Mr. Ragan had told him that everyone was happy with the contract and that some hoodlums from Detroit had come to Toledo and forced them to go back on strike and he wasn't going to let these outsiders come down here and push us around. *I protested that these were not the facts* and that the position of the union was that the persons who signed the agreement had no authority to do so *and further suggested that the court had no jurisdiction. He again said that I was not going to get a hearing on the matter and that he would make a little jurisdiction.*
>
> *"I told him that I was entitled to an immediate hearing on the matter particularly in view of the question of jurisdiction and he replied that he did not have time and that I would have to wait my turn."*
> (Emphasis ours.)

The Judge was informed that the petition *had not* asked for a restraining order pending a hearing on a temporary injunction[2] but had prayed for only a temporary injunction and that he had issued a temporary injunction.[3] In reply to this the Judge said (R. 39):

> "He replied that he did not read the petition very carefully and could not really say what it was all about but felt that he could take Mr. Ragan's word for the contents and again said that he did not have time to set the matter down for hearing, either now or in the future."

Had the court examined the petition filed by the employer (R. 8) before issuing the ex parte injunction instead of relying on statements of the plaintiff's counsel, or had the court honored the assurance given the petitioner that he would be notified if a temporary order was requested or conducted the inquiry suggested as being proper by the Canons of Judicial Ethics relating to the issuance of ex parte injunctions,[4] the court would have learned these facts:

---

[2] Under Ohio law (Section 2727.06 R. C.) restraining orders are permissible only when a court sets a motion for a temporary injunction for hearing, in which event a restraining order may issue pending the hearing for the temporary injunction. Here no such hearing was set.

[3] Throughout the proceedings the court considered the order as a temporary injunction. At page 17 of the Record the court said "* * *, this court granted the temporary injunction." At page 26 of the Record: The Court: "Well, we will take first things first. First, of course, will be the violation of the temporary injunction." At R. 30, "This Court at that time (May 27) granted a temporary restraining order—a temporary injunction."

[4] Canon 16: Ex parte Applications.

A judge should discourage ex parte hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such ex parte applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a

(Continued on following page)

3. Lack of State Court Jurisdiction Apparent; Court Again Refuses to Set Issue for Hearing.

(a) An unfair labor practice had been filed with the National Labor Relations Board charging the employer with refusal to bargain in good faith. (R. 3, 19.)

(b) Interstate commerce was involved. (R. 2, 55.)

(c) The "contract" which was the basis of the injunction action *was not* a completed contract. (R. 15.)

(d) A labor dispute was then in existence and negotiations for settlement were in progress. (R. 3, 10.)

(e) Peaceful picketing was in progress (R. 2, 5, 55).

Instead of resorting to Detroit hoodlums to "make a little jurisdiction" (R. 38) the court would have been able to discern that the conduct sought to be enjoined was arguably or potentially subject to the provisions of the Labor-Management Relations Act of 1947, as amended.

The Judge absolutely refused permission for another Judge to hear the matter. (R. 39.) (In Lucas County when a case is filed it is assigned to a Judge and stays with that Judge for determination of all matters from the be-

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(Continued from preceding page)

scrupulous cross-examination and investigation as to the facts and the principles of law on which the application is based, granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

ginning to the end of the lawsuit.) He did (R. 40), after a great deal of urging, agree to have Mr. Ragan, attorney for the plaintiff, appear that afternoon for a hearing on the question of the court's jurisdiction. The Judge assured the petitioner that he would contact him as soon as Mr. Ragan was contacted.

Again not hearing from the Judge, the petitioner called him at 4:00 o'clock that afternoon. This is what took place (R. 40):

> "Judge McCabe said that he had contacted Mr. Ragan but that he was about to leave and did not intend to hold night court. I requested that he hear the matter on Saturday and he stated that he would not be in over the weekend. I requested a hearing on Tuesday (Monday being a holiday) but he declared that he had a trial on that day and further said that it looked like the rest of his week was filled."

4. Client Informed of Court's Refusal to Act; Union Officials Decide to Test Jurisdiction Issue.

Convinced that Judge McCabe had no intention of granting a hearing, the petitioner and his associate consulted the authorities and concluded that an order made by a court in a matter over which it had no jurisdiction is void and contempt could not be predicated thereon. On the basis of this conclusion the petitioner called Mr. Friedman, regional counsel for the International Union, in Chicago where strike negotiations were then being conducted, and advised him of the status of the matter (R. 41):

> "* * * I explained to him that though it was possible to file a motion to vacate or demurrer to the petition that it was apparent from the actions of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of

the court's attitude, would not be a final order and could not be appealed.[5] I then told him that if we were correct on the law that the order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hope that Mr. Ragan would file contempt proceedings which undoubtedly would be heard immediately and from which we could instantly appeal to the Court of Appeals to determine the jurisdiction of the court.

"Mr. Friedman said that he would have to take the matter up with the officials of the union and that he would contact me later in the evening * * *"

"At about 8:00 P. M. Friday evening I received a call from Mr. Friedman who advised me that the union officials had considered the matter in detail and had concluded that on the basis of my report to them that their only possible course was to continue to picket. I thereupon called the union hall and told them of the decision of the officials and asked them to communicate this information to the pickets."

(The alleged acts of contempt on the part of the lawyer-petitioner were confined to those at 4:00 o'clock Friday afternoon when he talked by phone with the union's counsel in Chicago, giving the above quoted advice to the union's regional counsel.) (R. 41.)

Upon instructions from the union officials in Chicago some peaceful picketing continued at the premises. As a result, the employer filed an affidavit of contempt on May 31, 1960, naming one union member. (R. 16.)[6] That ended the first phase of the case.

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[5] Temporary orders are not appealable in Ohio.

[6] The contempt charged to the union officers was based on Ohio Revised Code Section 2727.12 which provides: "Upon being satisfied, by affidavit, of the breach of an injunction or restraining order, the court or judge who issued such injunction or order may issue an attachment against the guilty party who shall pay a fine of not more than two hundred dollars, * * *."

5. Court Agrees With Procedure to Hear Union Contempt Charge; Agreement Ignored.

The second phase of this case started Tuesday afternoon, May 31, 1960, in chambers, when the court, the petitioner and counsel for the employer discussed procedure to be followed in contempt proceedings involving the pickets. First the petitioner told the court (R. 43) that he had a motion to vacate the temporary injunction prepared and would file it immediately if he could obtain an early hearing. The court not only flatly refused but declared that it would be impossible to obtain a hearing within the week. Then the following arrangement was entered into:

> "Mr. Ragan then suggested that as an alternative that I agree to submit to the court the four signators of the agreement to be dealt with on contempt. After some discussion I agreed to do so and stated to both Judge McCabe and Mr. Ragan that I would gladly stipulate all matters necessary to establish the contempt so that I could immediately appeal the decision or file habeas corpus proceedings.
>
> "* * * I was convinced that both the Judge and Mr. Ragan were aware that I had consented to bring these men before the court and stipulate the essential matters for the express purpose of testing the validity of the court's order and its jurisdiction over the subject matter. So far as I was concerned, the matter was clear cut and the hearing the following day was to be short and to the point. To that end I prepared the necessary habeas corpus proceedings."

The next day, June 1st, the petitioner produced the four men in court as agreed, and after stipulating picketing had continued (R. 19) the petitioner went on to advise the court as follows:

> "I don't think any discussion would be fruitful except to show that this matter has been brought to the

attention of the National Labor Relations Board; an unfair labor practice charge has been filed against the employers for failing to bargain faithfully; that matter has been docketed in Cleveland, No. D-C-A 2168; as we had indicated before, in our discussion before * * *, we felt that when an order is made by a court which lacks jurisdiction over the subject matter of the action, it could not be a valid order, therefore, no process for contempt can issue in the face of its invalidity. We charge that this Court does not have jurisdiction by virtue of the fact that the National Labor Relations Act has been amended, and, since 1947, reposes the entire jurisdiction over this matter in the National Labor Relations Board, that this clause of a collective contract which has been violated, if we take the statements of the employer as correct, has been violated by the picketing and this picketing ensued without the necessary notification being given * * *."

Ignoring the fact that the procedure they had just been through was one agreed upon in the court's chambers the day before, the court then lectured the union people at length on the sanctity of the contract, apparently assuming that the action was based on a valid contract and enforceable in that court, and then demanded to know of the men in court why they had violated the order of the court or whether they were told by someone to do that. It was then that the court held the men to be in contempt and gave them until 10:00 A. M. Friday (two days later) to purge themselves (R. 22).

During the course of the questioning of the men by the court, the petitioner spoke up and said, "I can advise the court now that they were told by me." The petitioner then went on to explain the circumstances under which and to whom the advice was given (R. 23):

"Mr. Green: If the court will just allow me to recall for both the attorneys for the Toledo Marine Terminals and for the court and for myself some of the proceedings that have led up to this incident, I will. In the first place, an order was placed, an injunction was placed ex parte against this union.

The Court: That's right.

Mr. Green: Last Friday morning. This was after I had called you and asked you specifically to have a hearing.

The Court: I am not going into that at all.

Mr. Green: Let me explain, Your Honor, I think I can explain why, at least I can tell you in sequence why we have resulted in having to be here before you now in a contempt proceeding. Now, then, I came to you that same day and asked you if we would have a hearing, and you told me that there would be no hearing on this matter; you later suggested that if I could get Mr. Ragan to agree to a hearing on the injunction which was already issued—

The Court: That's right.

Mr. Green: —that you would have a hearing. Now, we couldn't get in touch with Mr. Ragan; it seemed very questionable that Mr. Ragan after once having had his day in court and having received what he wanted, would come back in here for a hearing on this matter; that afternoon at four o'clock you refused to have a hearing because you felt it was too late. I asked you whether we could have it on Tuesday, and you said "No." You also told me that you did not feel that any other court in this building could hear the matter even on the jurisdictional question; I don't mean on the contempt but only on the jurisdictional question. I was also told that on Tuesday you could not hear it and it was likely I wasn't going to get a hearing the rest of the week.

* * * * *

Mr. Green: I had only two ways to go at it; let me say this, that this Court had no jurisdiction—

The Court: That is beside the point.

Mr. Green: And consequently a contempt on the basis of an invalid order cannot stand.

The Court: That is beside the point.

Mr. Green: Well, it is not beside the point.

The Court: You could at least obey the order of the court and then come in and express whatever criticism you had and purge yourself.

Mr. Green: There were only two ways we could do this.

The Court: You could wait until we had a final hearing on the entire matter; that was the only way you could have done it; you could obey the order of the court.[1]

Mr. Green: No, we could not have done it that way. Then my clients would have had to give up the only vital right they had to bargain. The only other way this matter could have come up is the way it did come up, that is, by a contempt action in this Court, because this is the only way this matter could have been heard. I will say this to this Court that on Friday after the hearing of the Board of the International Longshoremen's Association in Chicago, where they were negotiating this matter, I explained the entire situation to them and they were reluctant to give up their rights as far as their economic rights were concerned and it was apparent that this Court had made a court order that was invalid on its face."

* * * * *

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[1] A final hearing in an action of this kind could not have been heard, in view of the court docket, for months.

6. Pickets Disobey Injunction on Orders of Union Superiors.

After this explanation the court wanted to know whether the men acted on their own initiative or whether someone told them to disobey the order of the court. The following from the record, at page 25, answered that question:

> "Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.
>
> The Court: Who did?
>
> Mr. Green: *Well, they were—*
>
> The Court: Who did?
>
> Mr. Green: *—instructed to do so by their superiors in the union* * * *, after they were advised by counsel that the order was not— (Our emphasis).
>
> The Court: That is a contempt of court."

In concluding the June 1st hearing the court said (R. 25):

> "They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt."

(Whether or not the court had a right to issue the injunction in the first place is one thing, but ordering the men back to work is another, and, we suggest, placed the court in the position of using its authority in an effort to break the strike.)

7. Lawyer Held in Contempt For Advice Given Client.

The men did not return to work as ordered by the court and did appear in court on Friday, June 3rd, as directed. The hearing held on that day was somewhat repetitious of the June 1st hearing. The court never did

get around to make a final order holding the men in contempt so that a writ of habeas corpus could be filed to test the court's jurisdiction.

Instead, the court started to badger and insult the petitioner who tried to explain to the court that inasmuch as the men were involved in a proceeding criminal in nature they were not required to testify against themselves. The pertinent part of the record of that hearing was as follows (R. 27):

"The Court: * * * Well, now, I think we should hear from these gentlemen who are held in contempt. Whether they are represented or whether they are not represented, they may individually or through counsel purge themselves of their contempt. It is very apparent from what has been tendered this morning that they are in contempt of court. The opportunity is always given, of course, to anyone who has violated an order of the court, to purge themselves if they choose to do so; so I think they should be called upon; well, I don't know whether they are represented by anyone or not.

Mr. Green: You mean these gentlemen?

The Court: Yes.

Mr. Green: They are represented.

The Court: By an attorney?

Mr. Green: They haven't taken my license away yet.

The Court: Well, what do you propose to do?

Mr. Green: If the court please, assuming they are resting, I propose to rest also, Your Honor. We are really here in a criminal proceeding and my clients are not required to testify in such a general action, they are not required—

The Court: You also advised them to violate an order of the court, too.

Mr. Green: I did.

The Court: You did. That may go on to the record, that the attorney appearing for these four defendants having violated the temporary injunction issued by this Court, and that he also advised them now not to take the stand to purge themselves of that contempt. Is that correct?

Mr. Green: I said, Your Honor, that I did not conceive that they could be called in a criminal proceedings to testify against themselves. I believe that this is a quasi-criminal proceedings, and that the law is clear in this matter.

The Court: Do they wish to purge themselves from contempt of court for violation of the court order which has already been violated?

Mr. Green: On behalf of all four men, Your Honor, I would just make this statement, that they do not wish to proceed further in this matter.

The Court: All right, now, I will—we will proceed from there. It is very apparent from what you have said here this morning that you are in contempt of court * * *. I will give you until next Tuesday to purge yourself of contempt of court. You stand from what you said here this morning in contempt of court, very definitely. I guess that's all."

* * * * *

On Monday, June 6th, the Judge signed and filed written charges against the petitioner under authority of, according to a designation made in the charges filed, Sections 2705.02[8] and 2705.03[9] of the Revised Code of Ohio (R. 29).

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[8] The part of Sec. 2705.02 upon which this charge was based is: "A person guilty of any of the following acts may be punished as for a contempt: (A) Disobedience of or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer."

[9] Sec. 2705.03 provides in part: "In cases under 2705.02 * * *, a charge shall be filed * * *, and an opportunity given to the accused to be heard, by himself or counsel. * * *"

The charges after reciting that the court had issued an injunction on May 27, 1960, went on to say (R. 29):

> "Whereas, one Merritt W. Green II, legal counsel for the defendants, did with full knowledge of said restraining order, advise and counsel said defendants to disobey said order; and
>
> "Whereas, said defendants and others, acting on the advice and counsel of said Merritt W. Green, II, did disobey said order by continuing picketing at or near the vicinity of the premises of the plaintiff at 26 Main Street, Toledo, Ohio, and
>
> "Whereas, said Green, after being notified in open court by the undersigned, that he was in contempt of court did and does continue to advise the said defendants to continue to disobey said order of the court;
>
> "Said Green is hereby charged with being in contempt of court, and a hearing thereon is set for June 7, at 10:30 o'clock, a.m., and the clerk is instructed to enter this charge on the journal of the Court.
>
> John M. McCabe,
>
> Judge of the Court of Common Pleas, Lucas County, Ohio."

That concluded the second phase of this matter.

3. Court Refuses Trial or Testimony in Defense.

The third and final phase of this case began on June 7, 1960 when the petitioner appeared before the court which declared him to be guilty of contempt during the earlier contempt proceedings of the union officials.

Following a discussion between the court and counsel for the petitioner at the start of the June 7th proceeding, during which time the court's jurisdiction of the subject matter was again raised, counsel for the petitioner endeavored to elicit from the court the real purpose of the proceedings that day.

After the court made it clear that he had determined the guilt of the petitioner on a prior date (R. 33, 34, 35.); that the petitioner was not going to have a hearing or a trial (R. 34.); that the petitioner would not be permitted to testify under oath in his own behalf (R. 34, 35.); that the only purpose of the proceedings was to sentence the petitioner (R. 33, 45.); counsel for the petitioner, after considerable difficulty in establishing the right to do so, read into the record, as an offer to prove, what the petitioner's testimony would have been had the court permitted him to take the stand. (R. 35, etc.)

The court thereupon ordered the petitioner committed to the Lucas County Jail for a period of ten days and to pay a fine of Five Hundred Dollars and stand committed until the fine is paid. (R. 46.) The court refused to grant bail in order for the petitioner to perfect an appeal. Therefore, a writ of habeas corpus was immediately filed in the Court of Appeals of Lucas County, Ohio. (R. 1.) The oral hearing on the application for a writ of habeas corpus was held on June 9, 1960.

9. No Disputed Facts at Appeals Court Hearing.

The hearing was short but the record discloses the following agreed and undisputed facts:

The employer was engaged in interstate commerce. (R. 2.)

The restraining order issued by the Court of Common Pleas was against peaceful picketing. (R. 2.)

That there was then pending an unfair labor charge before the National Labor Relations Board. The parties had agreed to dismiss this charge as a part of the strike settlement. (R. 3.)

The injunction action out of which the contempt citation against the petitioner arose was dismissed on June 9. (R. 6.)

Counsel for the employer, referring to the unfair labor practice charges said: "It alleged in a vague sort of a way that the company, the employer, Toledo Marine Terminals, had refused to bargain collectively, although *at the time it was filed, negotiations were almost continuously under way.*" It was filed, as the record discloses, on the morning of May 27, 1960, before the employer had filed a petition asking for an injunction. (R. 3.)

The Court of Appeals was informed that there was no allegation or claim any place along the line that there was any violence, intimidation, public disorder, blocking of entrances, or anything like that. "This is strictly a peaceful picketing case. No claim that there was anything but peaceful picketing." (R. 5.)

The petitioner was sworn, following which, it was stipulated that his testimony would consist of the same his counsel read into the record in the Court of Common Pleas "after the court refused to permit him to be sworn or give testimony." (R. 7.)

Following the filing of briefs, the Court of Appeals refused to order the release of the petitioner, one Judge dissenting. (R. 48.) On appeal as of right to the Supreme Court of Ohio, the decision of the Court of Appeals was affirmed, two Judges dissenting. (R. 63.)

10. Content of Supreme Court Decision.

In affirming the Court of Appeals, the Supreme Court said:

> (1) "An individual against whom an order of a court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void."

But, the Court held, a lawyer is in contempt of court if he advises a client of his right to disobey a void order of a court. The fact that the order is void, the court said, makes it none the less contempt. (R. 67.)

(2) That even though the Court of Common Pleas did not have jurisdiction over the subject matter, once having issued the order it became a valid order and remained one until the court held otherwise. (R. 67, 68.)

(3) The Court of Common Pleas had the right to issue an ex parte order prohibiting *all* picketing at the premises of the interstate employer solely on the basis of a petition by the employer *even though it did not allege any acts of violence or conduct likely to produce violence, mass picketing, threats, intimidation, or any kind of disorder* arising from the picketing of the employer's premises, *but alleged only a conclusion* that to permit picketing to continue "will result in danger to life and limb of the employees of the plaintiff company and irreparable loss and damage to property of the plaintiff. (R. 68.)

(4) That no trial or hearing was necessary because "the contempt had already occurred as disclosed in the hearing on June 1st and June 3rd, and the Judge presiding over that hearing was the same Judge who issued the restraining order and who conducted the proceedings on June 7th." (R. 69.)

These facts, the court apparently concluded, justified denying the petitioner the opportunity to offer *any defense* to the written charges of indirect contempt.

SUMMARY OF ARGUMENT.

1. Lack of State Court Jurisdiction.

The procedure suggested by the petitioner to test the jurisdiction of the state court was the product of necessity born of unusual circumstances.

The court, despite assurances given to the petitioner, issued an ex parte temporary injunction ordering all peaceful picketing to cease in a labor dispute affecting interstate commerce. Thereafter the court refused to hold a hearing before the final hearing on the permanent injunction. Convinced that the court did not intend to determine the issue of jurisdiction and convinced that the ex parte order was void and if obeyed would have the immediate effect of destroying the concerted bargaining rights of the employees, the petitioner then suggested to the union's regional counsel the possibility of obtaining a hearing via habeas corpus if picketing continued.

For doing this the petitioner was sentenced to jail and assessed a $500.00 fine.

The Ohio courts by their decisions here sanction the circumvention of the Supremacy Clause of the United States Constitution by holding, in effect, that every ex parte temporary injunction is a status quo order to preserve existing conditions, relying on the decisions of this Court in *United States v. Shipp*, 203 U. S. 563 (1906), and *United States v. United Mine Workers*, 330 U. S. 258 (1947), to reach that conclusion.

An examination of these two cases does not, we submit, support the conclusions reached by the Ohio courts.

In those cases interlocutory orders were issued *in order to preserve conditions then existing.* There was no question that the court in each case did have jurisdiction over the subject matter. Neither case holds or infers that an interlocutory order issued by the court *not having jurisdiction over the subject matter* is valid for any purpose.

Our case did not involve a temporary order to preserve existing conditions by a court having jurisdiction over the subject of the action. The injunction sought and granted was the main relief sought and was not ancillary to the main relief as in *Shipp* and *United Mine Workers.*

In this case no status quo order was issued because: (1) the court did not intend its injunction to preserve existing conditions until it had an opportunity to determine its jurisdiction; (2) under Ohio law (Sec. 2727.03 R. C.) the court was required to determine its jurisdiction in order to issue a temporary injunction at the beginning of the action; and (3) the conditions existing at the time when the injunction was issued were a strike and picketing, conditions prohibited not preserved by the ex parte order.

The method used by the Ohio courts to circumvent the Supremacy Clause of the Constitution surely interferes with the preservation of a uniform labor policy unaffected by local rules or prejudices as Congress intended when it created the National Labor Relations Board, reposing exclusive and primary jurisdiction in that board for the purpose of resolving and adjudicating all matters protected and prohibited under Sections 7 and 8 of the Act.

The sanction given by the Ohio courts to the prohibition of all picketing arising out of a labor dispute between an interstate employer and his employees is in di-

rect conflict with *Youngdahl v. Rainfair, Inc.*, (1957) 355 U. S. 131, where this Court held that though state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing.

The only time a state court may enjoin all picketing, this Court held, is when the violent activity is such as to make further peaceful picketing impossible. There is not, we believe, one word in this record to justify a deviation from the law as pronounced by this Court in *Youngdahl, supra.*

The plaintiff in the initial state court action based its prayer for injunction on the claim that the defendants had breached a no strike clause of the alleged contract by again establishing a picket line at the plaintiff's property; *not on acts of violence or disorder by the pickets.*

The petition filed reveals that there was not one single word alleged claiming mass picketing, threats, intimidations, name calling, blocking of entrances, causing traffic delays or stoppage, or any public disorder of any kind or description.

These Ohio decisions also do violence to the clear pronouncements of lack of state court jurisdiction contained in *San Diego Building Trades Council v. J. S. Garmon*, (1959) 359 U. S. 236 and, of course, other pronouncements by this Court in the development of the pre-emption doctrine starting with *Joseph Garner v. Teamsters, Local 776*, (1953) 346 U. S. 485, and on down through *Weber v. Anheuser-Busch, Inc.*, (1955) 348 U. S. 478; *Guss v. Utah Labor Relations Board*, (1957) 353 U. S. 1; *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, (1957) 353 U. S. 20; *San Diego Building Trades Council v. J. S. Garmon*, (1957) 353 U. S. 26.

The violence done here to the pre-emption doctrine

by the Ohio courts is evident by only casual reference to the second *Garmon* case, 359 U. S. 236.

The opinions in that case make it clear that *the Labor-Management Relations Act has effected a withdrawal of the jurisdiction of the courts of the respective states over any controversy, dispute or conduct which may be said to be arguably protected or prohibited by the Act.*

Two other aspects of the pre-emption doctrine which are particularly applicable to the original injunction action here to prohibit picketing are clearly within the principles stated in the second *Garmon* case, *supra*; principles completely ignored by the Ohio courts. They are:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has jurisdiction to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined are *arguably or potentially* within the jurisdiction of the National Labor Relations Board, deferring to that tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the National Labor Relations Board jurisdiction.

The procedure suggested to the union officials by the petitioner was certainly consistent with this Court's holding in *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951) as well as

decisions on the same issue by the highest courts of Texas, Michigan, and Indiana.

The Supreme Court of the State of Texas in the cases of *Ex Parte Dilley*, (1960) 334 S. W. (2d) 425, and *Ex Parte Twedell*, 158 Texas 214 (1958), 309 S. W. (2d) 834; the Supreme Court of Michigan in the case of *Town and Country Motors v. Local 328 I. B. T.*, 355 Mich. 26 (1959), 94 N. W. (2d) 442 and the Supreme Court of Indiana in *State Ex Rel. Taylor* (1959) 162 N. E. (2d) 90 have approved the procedure followed by the petitioner. These cases are on all fours with this case.

In each of those cases the court held that the Labor-Management Relations Act had pre-empted the jurisdiction over the subject matter of the action thereby rendering the temporary injunction or restraining order void and in each instance contempt convictions issued by the trial courts for disobedience of the void orders were declared unenforceable. Parenthetically, in none of the cases was there a hint or suggestion that the attorney representing the defendants seeking this means of testing the jurisdiction of the court should be held in contempt for the advice given their clients.

In the Wisconsin case the Employment Relations Board obtained an ex parte restraining order requiring that the petitioners "absolutely desist and refrain from calling a strike, or going out on strike * * * which would cause an interruption of the service of the (Gas Company)" and ordering the petitioners to "take immediate steps to notify all employees called out on strike to resume service forthwith." The Wisconsin Court found that the petitioners had not obeyed the restraining order and entered a judgment of contempt.

This Court reversed the contempt conviction, holding that the subject matter of the particular dispute had been

pre-empted by the enactment of the Labor-Management Relations Act of 1947 and, therefore, the contempt order of the state court was unenforceable.

There is no difference in substance between the procedure adopted by the petitioner in the present case to test the jurisdiction of the Ohio trial court over the subject matter of the dispute and that adopted by the attorneys representing the unions in the above cited case.

2. Threat of Contempt Deprives Employees of Counsel.

This Court condemned the use of contempt to silence a lawyer in the honest discharge of his duty to a client in the case of *In re Watts*, 190 U. S. 1 (1902). One statement by Chief Justice Fuller at page 29 and in that case brings into focus the sharp conflict between the Ohio courts and this Court on the right of members of the legal profession in good faith to advise their clients:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that this advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

The advice given by the petitioner here was given after a thorough examination and research of the law. The several cases discussed more fully in this brief provide ample authority for the procedure adopted and the advice given. The advice was given in good faith and without any attempt to malign or bring the court into disrepute. It was a candid effort on the part of the petitioner to test the

jurisdiction of the trial court over the subject matter of a labor dispute affecting interstate commerce after the court left no other course open for the determination of the issue. All parties involved were aware that the procedure adopted by the petitioner was a technical means of obtaining a final and appealable order.

The independence of the bar in the administration of justice is as important before state courts as it is before federal courts, particularly when the state courts are interfering with the administration of federal law. To permit the jailing of lawyers by state courts for giving advice in good faith is to deprive employees of interstate employers of counsel.

3. Due Process Requires Full Trial; Impartial Court.

In asking this Court to strike down the Ohio decisions for the reason that the petitioner was denied due process of law in not receiving the rudiments of a fair hearing before a fair tribunal we do not urge any expansion of the outer limits of the concept of civil rights. The peculiar facts of this case add up to disclose a shocking and total failure to respect the basic rights of this lawyer as a citizen and the rights of the labor organization under the constitution and federal law.

The Ohio trial court, for instance, seized upon isolated statements at the contempt hearings of the union officers, statements torn completely out of context, and during the last of such hearings declared the petitioner guilty of contempt of court for advising his clients.

When the petitioner appeared before the same Judge on June 7th, 1960, no evidence was introduced respecting the crime with which the petitioner was charged. Only brief statements were made by the court to the effect that the petitioner had advised the defendants to disobey the

order of the court and was, therefore, in contempt. Despite the fact that the proceedings constituted criminal contempt the petitioner's counsel was not permitted or afforded the opportunity to inquire into the statements made by the court nor was the petitioner permitted to take the stand in his own behalf or produce other witnesses or evidence. The court instead clearly stated that the only purpose of convening court on the 7th day of June, 1960 was for the purpose of sentencing the petitioner.

The conflict between the conduct of the Ohio trial court and the minimum requirements of due process established by this Court are evident by only a casual reference to three decided cases.

In the case of *In re Oliver*, 333 U. S. 257 (1947), this Court laid down the law that a defendant in indirect contempt proceedings is guaranteed (1) the right to reasonable notice, (2) a right to a trial, (3) a reasonable opportunity to defend himself, (4) the right to testify and be heard in his defense, and (5) the right to examine witnesses.

In an earlier case, *Cooke vs. U. S.*, 267 U. S. 517 (1925), this Court held that even though knowledge of the alleged contempt be acquired from the testimony of others, *or even from the confession of the accused*, those facts would not justify conviction without a trial in which there was an opportunity for defense.

In a subsequent case before this Court, *In re Murchison, et al.*, 349 U. S. 133 (1955) a case arising out of the use of the one-man grand jury system in Michigan, the question before the court was whether a contempt proceeding conducted in accordance with the minimum standards established in *Re Oliver, supra*, "complies with the due process requirement of an impartial tribunal" where

the same Judge presiding at the contempt hearing had also served as the "one-man grand jury" out of which the contempt charges arose. The Court said:

> "A fair trial in a fair tribunal is a basic requirement for due process." and
>
> "Fair trials are too important a part of our free society to let prosecuting Judges be trial Judges of the charges they prefer."

The honest statements of the petitioner at the June 1st and June 3rd hearings were not contemptuous per se and involve no more than a recitation of the facts which had occurred outside the courtroom. The statements attributable to the petitioner by the Ohio courts as justification for the denial of a trial are wholly inaccurate when viewed in the context of the entire record. The refusal to accord the petitioner an opportunity to explain those statements and to call witnesses to verify his explanation is, we suggest, in direct conflict with everything established in *Cooke, Oliver* and *Murchison* as basic elements of due process of law to be accorded to every citizen.

ARGUMENT.

The law we believe to be pertinent in this case will be discussed within the framework of three sections. This will be done in the order in which the questions occurred from the beginning of the original proceedings on down through the contempt case involving the petitioner.

The law to be discussed in these three sections relates to:

1. Jurisdiction of State Court.

   Whether the state court had jurisdiction of the subject matter in the action filed by the employer and the right to issue an injunction prohibiting peaceful picketing in the labor dispute admittedly within the area of interstate commerce.

2. Contempt of Court.

   Whether the proper administration of justice in the areas of both federal and state law and procedure requires that lawyers be permitted to give and clients receive advice based on an honest interpretation of the law and given in good faith for the protection of the rights of clients.

3. Due Process of Law.

   Whether the constitutional guarantees of due process can be denied a lawyer charged with contempt for giving advice to his client.

I. THE STATE COURT DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER.

(a) Jurisdiction of the Subject Matter is Essential to the Issuance of Valid Order.

At the outset we suggest that if the Court of Common Pleas of Lucas County, Ohio did not have jurisdiction over the subject matter of the original injunction action filed by

the employer against the union it must necessarily follow that the court did not have authority to issue either the temporary or the permanent injunction requested by the employer, or hold the petitioner to be in contempt of court.

We can find no serious disagreement among the authorities that an order issued by a court beyond or in excess of its jurisdiction is a nullity. This principle appears to be as old as the common law.

In discussion of "The Doctrine of Judicial Immunity" in the June 1960 issue of the American Bar Association Journal, at page 605, reference was made to a case decided at the Michaelmas Term in the tenth year of the reign of King James, published in Volume X of Lord Coke's reports in the year of 1613. The author quoted the rule in this language from that case:

> "* * * When the court does not have jurisdiction of the cause, the whole proceeding is coram non judice, and action will lie without any regard to the precept or process, for *'it is not of necessity to obey him who is not judge of the cause, no more than it is a mere stranger.'* " (Emphasis ours.)

American Jurisprudence summarizes the rule in Volume 14 where at page 363, Section 160, it say :

> "Jurisdiction is concisely stated to be the right to adjudicate concerning the subject matter in a given case."

and at page 385 where it is said:

> "The first duty of a court is to determine whether it has jurisdiction of the subject matter. * * * *Where judicial tribunals have no jurisdiction of the subject matter* on which they assume to act, *their proceedings are absolutely void* in the strictest sense of the term." (Emphasis ours.)

Then in the same section of *American Jurisprudence* (191) this statement is made relative to the duty of the court to recognize and to determine want of jurisdiction:

> "A court will recognize want of jurisdiction over the subject matter even if no objection is made. Therefore, *whenever a want of jurisdiction is suggested*, by the court's examination of the case or otherwise, *it is the duty of the court to consider it*, for if the court is without jurisdiction, it is powerless to act in the case." [10] (Emphasis ours.)

The rule of jurisdiction is the same in contempt matters. To constitute contempt the order or injunction disobeyed must be a lawful one and issued by a court acting within its jurisdiction. This rule is stated in Section 24 of 12 *American Jurisprudence* at page 405 where, among other pertinent statements, it says:

> "* * * to render one liable for contempt in disobeying an order of decree of court, it is essential that the court have jurisdiction in the premises. Disobedience of an order made without jurisdiction, or in excess of jurisdiction is not punishable as contempt."

This Court in *Ex Parte Fiok*, 113 U. S. 713 (1884) had this to say on that subject:

> "If a court is without authority to make an order it is equally without authority to enforce such orders by process for contempt."

and in the case of *In Re: Ayres, Scott & McCabe*, 123 U. S. 443 (1887) this:

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[10] Here want of jurisdiction was suggested to the court (1) by the phone call prior to the issuance of the injunction; (2) by the petition for injunction; (3) at each meeting with the court thereafter starting with the one minutes after the ex parte order was issued; and (4) by the court (R. 20) where the court said: "The court may not have jurisdiction; I don't know; perhaps some of these preliminary matters should have been cared for."

"When a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which the court had no authority to make, the original order being void for want of jurisdiction, the order punishing for contempt is equally void; * * *."

A distillation of cases pertaining to jurisdiction leads to the conclusion that there are three essentials necessary to the validity of every judgment: (1) jurisdiction of the parties, (2) jurisdiction of the subject matter, and (3) power or authority to decide the particular matters presented. Each of these three elements must be present to make a decree or judgment of a court of competent jurisdiction valid and binding so that such judgment or decree cannot be subject to collateral attack. 12 *A. L. R.* (2d) 1066.

(b) The Labor Dispute in Progress Involved Interstate Commerce—the Picketing was Entirely Peaceful.

In considering whether the Court of Common Pleas of Lucas County, Ohio had jurisdiction of the subject matter of the action out of which contempt charges against the petitioner arose, these undisputed facts are pertinent:

1. The employer was engaged in interstate commerce. (R. 2.)

2. There was an unfair labor practice charge then pending against the employer before the N. L. R. B. (R. 3, 19.)

3. Counsel for the Terminal Company conceded that negotiations as well as picketing were in progress when he filed the injunction petition. (R. 3, 18.)

4. Picketing was peaceful. There was no disorder of any kind; there was no mass picketing; there was no blocking of entrances to the premises of the

employer; there was no blocking or obstructions of the public streets or sidewalks. (R. 2, 5.)

5. The so-called labor contract, Exhibit A of the injunction petition, shows on its face that it was not completely executed. (R. 15.)

6. The action filed by the plaintiff in the Court of Common Pleas sought only to enjoin picketing. The prayer requested (1) a temporary injunction (R. 11), and (2) a permanent injunction. (R. 12.)

7. The relief sought, both temporary and permanent, was to prohibit peaceful picketing which was in progress at the time the petition was filed. (R. 2, 5.) The petition did not contain any allegations of fact—not one—that the picketing was anything but peaceful in every respect. (R. 8, 9, 10, 11, 12.)

8. The injunction sought and the injunction granted *was not* to preserve existing conditions. The employees were already out on strike. (R. 18.)

Despite these undisputed facts, *the Ohio Courts held that the temporary injunction against peaceful picketing was valid simply because the Court of Common Pleas had taken jurisdiction over the labor dispute and had issued an injunction.*

(c) Assuming Jurisdiction Does Not Create Jurisdiction to Make a Temporary Injunction a Valid "Status Quo" Order.

Without one word in reference to the decisions of this Court which have refined the pre-emption doctrine in interstate labor matters or the provisions of the Labor-Management Relations Act, the Ohio Courts held that the Court of Common Pleas had jurisdiction to issue the temporary order prohibiting all picketing of the premises of

the Toledo Marine Terminal to preserve existing conditions until such time as the court could pass upon the question of its own jurisdiction. (R. 50, 52, R. 67, 68.)

This was on the theory that having issued a temporary injunction, even if done without jurisdiction over the subject matter, the order somehow created jurisdiction until such time as the court could get around to determine that it did not have jurisdiction over the subject matter.

The Ohio courts in approving the action of the trial court prohibiting peaceful picketing, relied principally on the decisions of this Court in *United States v. Shipp*, 203 U. S. 563, 51 L. Ed. 319, and the *United States v. United Mineworkers of America*, 330 U. S. 258, 91 L. Ed. 884, where it was held that an order issued to preserve existing conditions by a court *with jurisdiction over the subject matter of the action* must be obeyed until the court had an opportunity to consider the questions raised by the pleadings and/or evidence.

The effect of the Ohio decisions in equating the facts here with situations in genuine status quo cases is to make every temporary injunction in a strike situation a valid status quo order. We submit that there could not be a more effective device created to deprive employees of rights granted and protected by federal law than court-sanctioned use of the ex parte injunction, as here, under the guise of being a valid status quo order such as in *Mineworkers* and *Shipp, supra*.

Here the Ohio courts have devised a very simple method by which state courts can successfully evade the Supremacy clause of the Federal Constitution, the provisions of the Labor-Management Relations Act and the decisions of this Court. To make this device more effective the Ohio courts make it a criminal offense if those entitled to the privileges and protection of Federal law,

including the right to counsel, are honestly and correctly advised that the ex parte injunction is not valid. (R. 67.)

(d) The Temporary Injunction Prohibiting Peaceful Picketing Was Not a Status Quo Order.

Do the facts of this case raise the temporary injunction issued by the Ohio trial court to the status of a valid status quo order? We think not.

First, the Ohio court did not intend its order to be for the purpose of preserving conditions then existing. It's only purpose was to stop picketing. In fact, the court, without any authority in law of which we are aware, went so far as to order the strikers to return to work under threat of contempt.[11]

Second, under Ohio law, the court's temporary injunction could not be a status quo order for the purpose of preserving conditions until it could determine its jurisdiction. This is so because injunctions can be granted at the beginning of an action *only* when it appears that the plaintiff is entitled to an injunction.[12] Inasmuch as this *was not* a restraining order pending hearing on an application for a temporary injunction[13] but was a temporary injunction, *the court was required to determine that it did have jurisdiction over the subject matter before it issued the temporary injunction.*

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[11] "* * * They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt." (R. 25.)

[12] Section 2727.03 Ohio Revised Code, so far as it applies to the case, provides: "At the beginning of an action, * * * an injunction may be granted * * *, when it appears * * *, that the plaintiff is entitled to an injunction."

[13] Section 2727.06 Ohio Revised Code provides that a restraining order can be issued pending a hearing on the issuance of an injunction. This is the only provision in Ohio law for the issuance of a restraining order.

None of the cases relied upon by the Ohio courts, *United States etc. v. John Shipp, et al.*, 203 U. S. 563 (1906) and *United States v. United Mineworkers etc.*, 330 U. S. 258 (1947) in particular, hold or infer that an interlocutory order issued by a court *not having jurisdiction over the subject matter* is valid for any purpose.

In those cases, the so-called status quo cases, interlocutory orders were issued in order to preserve conditions existing at the time the orders were issued. There was no question that the court in each case *did have jurisdiction over the subject matter.*

This case, however, did not involve a temporary injunction to preserve existing conditions by a court having jurisdiction over the subject matter. *The injunction granted here was the main relief sought. It was not ancillary to the main relief* as in *Shipp* and *Mineworkers.*

In *Shipp* this Court had granted a petition to appeal the judgment of the Circuit Court of Appeals in a case involving a death sentence decreed by a Tennessee state court. Pending hearing on the appeal, an order was issued to state officials to stay the execution. This order was violated. There could be no question that the court had jurisdiction over the subject matter, to-wit: an appeal on constitutional grounds and thus a right to issue a stay order—to preserve the life of the prisoner. Certainly this Court and only this Court, once having noted probable jurisdiction, could determine whether jurisdiction was to be exercised in the final instance.

In *Mineworkers* the government had filed an action for declaratory judgment to determine whether the union had a right to unilaterally terminate a labor contract, the Federal Government then being the operator of the coal mines. A request for a temporary injunction was made pending the hearing on the merits. A date was set for a

hearing on the request for the temporary injunction, pending which a restraining order was issued prohibiting a strike by the mine workers. The mine workers went on strike despite the order.

Again, there is no question that the District Court had jurisdiction over the subject matter of the action—the declaratory judgment—and had a right, pending a hearing on the temporary injunction, to issue an order to preserve existing conditions.

In our case, however, the trial court arrogated jurisdiction to itself in issuing the temporary injunction in circumstances where it had none in the first instance. It cannot be said, we feel, that a court without jurisdiction can make jurisdiction by merely taking jurisdiction. For instance, in *Green, et al. v. Obergfell, et al.*, 121 Fed. (2d) 46 the court said that an exercise by a court of its power to determine whether the conditions essential to the exercise of jurisdiction by it exists cannot create additional jurisdiction.

(e) Ex Parte Injunction Prohibiting All Picketing Not Warranted in Absence of Violence or Other Disorder.

As if approval of the use of the ex parte injunction under the guise of it being a valid status quo order didn't do enough violence to the Supremacy clause of the Federal Constitution in this instance, the Ohio Supreme Court approved the use of the ex parte injunction to prohibit peaceful picketing without the necessity of the petitioning party alleging any facts or circumstances indicating that violence, mass picketing or public disorder of any kind is being carried on or likely to result.

In its opinion the Supreme Court said (R. 68):

> "It is to be noted that the petition filed in the Court of Common Pleas on which the restraining

order was based alleged the imminence of violence in connection with the picketing of plaintiff's premises."

Then the Court went on to say:

"Even in labor disputes where the federal labor relations statutes are applicable and exclusive, the Supreme Court of the United States has held that *state courts possess the authority to intervene to enjoin mass picketing or picketing accompanied by violence and intimidation.*" (Emphasis ours.)

While the Supreme Court's statement of the right of the authority of state courts to enjoin mass picketing, violence, intimidation or other public disorder is not incorrect, *the court's statement* that the petition for injunction "alleged the imminence of violence in connection with the picketing of plaintiff's premises" *has no basis in fact.*

First, the plaintiff did not seek an injunction on the basis of mass picketing or picketing accompanied by violence and intimidation. It sought to enjoin the picketing on the basis of a claimed violation of a collective bargaining contract. Second, *the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence and intimidation.*

In the first nine paragraphs of its petition the plaintiff set forth facts *and conclusions of law* asserting that a collective bargaining contract had been concluded on May 26, 1960, following a strike and negotiations which began May 15, 1960. (R. 8, 9, 10.) The employer-plaintiff claimed that the resumption and/or continuation of picketing May 27th violated a no-strike clause. (R. 10.)

Then in paragraph number 10 (R. 11), after averring that the conduct in "posting of pickets" was illegal and unlawful, the petition said "that a continuation of said illegal and unlawful conduct * * *, which will continue unless enjoined by order of this Court, will result in danger to

life and limb of the employees of plaintiff company and irreparable loss and damage to property of plaintiff company, and that plaintiff has no adequate remedy at law."

This conclusion in the pleading must be that portion of the petition referred to by the Ohio Supreme Court when it said "the petition filed in the Court of Common Pleas * * * alleged the imminence of violence in connection with the picketing of plaintiff's premises." (R. 68.) That this is true is evident from the fact that the language quoted in the preceding paragraph from page 11 of the record is the only language in the petition out of which the Supreme Court's conclusion could have been created.

(f) State Court Assumption of Jurisdiction Violates Supremacy Clause.

The sanction thus given by the Supreme Court of Ohio to the use of the ex parte injunction in interstate labor disputes issued solely on the basis of an employer's petition and without the necessity of alleging any facts justifying the assumption of jurisdiction by state courts not only violates the Supremacy Clause of the Federal Constitution but it can effectively wipe out the doctrine of federal pre-emption in Ohio.

One of the earlier decisions of this Court unequivocally declaring the supremacy of Federal law in labor-management disputes involving interstate commerce was *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951).

In that case union officials had been held to be in contempt for either failing to prevent a strike or permitting continuance of a strike by employees of a utility. The Wisconsin Court had issued the injunction pursuant to a Public Utilities Anti-Strike Law.

Among other things, the Court held that none of the sections of the National Labor-Management Relations Act, as amended in 1947, could be read as permitting state regulation of peaceful strikes for higher wages. Congress, the court said, occupied this field and closed it to state regulation, citing *Plankington Packing Co. v. Wisconsin Board*, 338 U. S. 953 (1950); *LaCrosse Telephone Corp. v. Wisconsin Board*, 336 U. S. 18 (1949); *Bethlehem Steel Co. v. New York Board*, 330 U. S. 767 (1947); *Hill v. Florida*, 325 U. S. 538 (1945).

The court found that the Wisconsin law prohibiting strikes and substituting therefore compulsory arbitration was in conflict with Section 7 of the Labor-Management Relations Act permitting the exercise of the right to bargain collectively and engage in concerted activities for that purpose. The court concluded its decision by holding that:

> "the National Labor Relations Act of 1935 and the Labor-Management Relations Act of 1947, passed by Congress pursuant to its powers under the Commerce Clause, are the supreme law of the land under Article 6 of the Constitution."

The contempt convictions were reversed.

(g) State Court Has No Jurisdiction Where Labor Dispute is Arguably or Potentially Subject to National Labor Relations Board Jurisdiction.

The doctrine of federal pre-emption in labor disputes involving interstate commerce has developed through and been refined by the opinions of this Court. This is not to say that every specific issue involving these jurisdictional questions has been resolved by this Court, indeed, it is a field of ever expanding development. It is to say, however, that every succeeding opinion of the Court becomes the

current literature of the doctrine, to which courts and attorneys must turn for the resolution of all issues within this field.

Insofar as it affects the matter which was before the Ohio courts, it may be stated with accuracy, we believe, that a state court has absolutely no jurisdiction to regulate, by injunction or otherwise, peaceful picketing arising out of a labor dispute that is arguably or potentially subject to the jurisdiction of the National Labor Relations Board.

It is, of course, completely within the jurisdiction of the state court to enjoin violent conduct or mass picketing on the part of a union and to award damages to persons injured as a result of such violence. *Union Carpenters Local v. Laburnum*, 347 U. S. 656 (1954); *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957); *United Oil Workers v. Rochelle*, 356 U. S. 656 (1958). Our case, as we have repeatedly pointed out, involved only peaceful picketing.

The decisions of the Ohio courts in approving the prohibition of all picketing are in direct conflict with this Court's decision in *Youngdahl v. Rainfair, Inc., supra*, where it was held that although state courts can enjoin violence, intimidation and threats of violence by strikers, they cannot encroach upon the exclusive jurisdiction of the N. L. R. B. by prohibiting all picketing. The only time a state court may enjoin all picketing, this Court said, is when the violent activity is such as to make further peaceful picketing impossible.

The first complete statements of the pre-emption doctrine were announced in *Joseph Garner v. Teamsters, Local No. 776*, 346 U. S. 485 (1953) and in *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 478 (1955). The doctrine then received further consideration, refinement and expansion in 1957 when this Court announced its decisions in *Guss v. Utah Labor Relations Board*, 353 U. S. 1, *Amal-*

gamated Meat Cutters v. Fairlawn Meats, Inc. 353 U. S. 20, and *San Diego Building Trades Council v. J. S. Garmon*, 353 U. S. 26. It reached its present all-embracing position in the second Garmon decision in *San Diego Building Trades Council v. J. S. Garmon*, 359 U. S. 236 (1959).

(h) This Court's Second Garmon Decision Covers the Basic Issue of This Case.

The *second Garmon* decision is, we have believed, decisive of our case if, indeed, we were required to go that far for authorities to support the proposition that the initial state court here was without jurisdiction of the subject matter and consequently its orders and contempt decision were, if for no other reason, void.

As we read this Court's decision in the *second Garmon case*, the principal issue was whether the state court had jurisdiction to even award damages arising out of peaceful union activities.

In holding that a state court lacks jurisdiction to award damages to an employer for peaceful union conduct that is potentially subject to exclusive federal jurisdiction under the Labor-Management Relations Act, the Court made several pronouncements which materially affect and firmly establish the pre-emption doctrine and certainly appear to control the matter which was before the state courts in this case.

In outlining what seems to be the basic precepts of the pre-emption doctrine, the Court, in the *second Garmon case*, pointed out that Congress in adopting the Labor-Management Relations Act did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law general to the parties, but has entrusted the administration of the labor policy of the nation to a

centralized administrative agency, the National Labor Relations Board, armed with its own procedure and equipped with its specialized knowledge and accumulated experience. The legislative grant of administrative power to the National Labor Relations Board is more than a means of regulation, this Court held, it is regulation; regulation in the broadest sense, administrative and remedial.

Congress has, the Court said, reposed exclusive jurisdiction in such a tribunal in order to obtain uniform application of substantive law and to avoid the diversities and conflicts which would inadvertently result from a multiplicity of local procedures and attitudes toward labor controversies. The Court pointed out that to allow the States to control conduct which is the subject of uniform national regulation would create potential frustration of national purposes.

The majority opinion in the *second Garmon case*, observed that judicial concern has been necessarily focused on the *nature* of the activities which the States have sought to regulate rather than on the method of regulation adopted.

At times it has not been clear, the Court said, whether the particular activities attempted to be regulated by the State are within or without the exclusive ambit of the National Labor Relations Board. But courts, either state or federal, or not, this Court held, the primary tribunal to adjudicate such issues; *it is essential to the administration of the act that these determinations be left in the first instance to the National Labor Relations Board itself.*

The Court then went on to say that in the absence of the Board's clear determination that an activity is neither protected or prohibited or of compelling precedent applied to essentially undisputed facts, it is not for the courts to decide whether the activities or dispute is subject to state jurisdiction.

Therefore, this Court concluded, *peaceful union activity which is potentially or arguably protected or prohibited by Section 7 or 8 of the Labor-Management Relations Act is not subject to state regulation by any means, and it is within the exclusive jurisdiction of the National Labor Relations Board to determine in the first instance whether particular conduct is protected or prohibited under such sections.*

There are, in summary, two other aspects of the preemption doctrine which have particular application to this case. Both, we believe, have been clearly stated in the *second Garmon decision* and may be stated as follows:

First, it is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has the right to determine the issues involved.

Second, the state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined is arguably or potentially within the jurisdiction of the National Labor Relations Board, deferring to that latter tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt must be resolved in favor of the N. L. R. B. jurisdiction.

The nature of the dispute in this case and the activity of the union as a result of the dispute was arguably or potentially protected or prohibited by the Labor-Management Relations Act. Therefore the primary responsibility for the determination of the status of the disputed activity was within the jurisdiction of the National Labor Rela-

tions Board. This is particularly true in view of a total absence of any activity involving public disorder and in view of the fact that an unfair labor practice charge had been asserted against the employer prior to the time the position was filed in the Court of Common Pleas.

It would appear then that a reasonable conclusion to be drawn from the decisions of this Court is that the Court of Common Pleas of Lucas County, Ohio did not have jurisdiction over the subject matter and any order issued by that court was a nullity.

(i) Contempt Cannot be Based on Disobedience of Order Issued by Court Without Jurisdiction of Subject Matter.

The question of the state court's jurisdiction over the subject matter is necessarily part and parcel of the right of the trial court to find the petitioner in this case in contempt of court. In 12 *American Jurisprudence* at Section 26, page 407, the text reiterates and reaffirms the proposition that an injunction to be entitled to obedience must be issued by a court having jurisdiction in the matter. The text goes on to lay down this proposition:

> "The only legitimate inquiry in the contempt proceeding, based upon the violation of injunction, is whether the court granting it had jurisdiction of the parties and of the subject matter. * * *
>
> "Where, however, the court in granting the injunction acted without jurisdiction, a violation of the order which it assumed to make does not constitute contempt; no one is bound to obey such a decree and the court making it has no power to punish a disobedience thereof."

For the purpose of demonstrating the sharp conflict between the result in the Ohio decisions and decisions of other state Supreme Courts, we allude to four such de-

cisions which involve the question of contempt for picketing in violation of state court orders prohibiting such activity. Three of these cases, the Texas cases and the Michigan case, are on all fours with our case.

The first of these cases is *Ex parte Twedell*, decided by the Texas Supreme Court on January 29, 1958, 309 S. W. (2d) 834. It was an original habeas corpus proceedings from a commitment order on a judgment of contempt for the violation of a temporary injunction.

The original injunction suit was to enjoin picketing by The Amalgamated Meat Cutters at the various stores of the plaintiff. The picketing was peaceful and the plaintiffs in the original action claimed that there was no labor dispute existing between the stores and their employees and that the union represented none of their employees. A temporary injunction was granted. No appeal was taken from that action by the court. Instead the union resumed picketing. This resulted in the contempt proceedings.

In vacating the contempt conviction the Texas Supreme Court said, starting at page 845:

> "Since we have held that the conduct is an activity within the Labor Management Relations Act, that the business of the Minyard Stores is one affecting interstate commerce, it follows that the state court was without jurisdiction to grant the petition for injunction. This being true, the judgment granting the injunction is void and the Relator cannot be held in contempt of a void judgment."

The Michigan case is *Town and Country Motors v. Local 328, IBT*, 94 N. W. (2d) 442. It was decided by the Michigan Supreme Court on January 12, 1959. The original injunction action arose out of efforts of the union to organize the employees of the plaintiff. In the course of this organization drive and as a part of it, picketing took

place. There were no overt acts of violence and the picketing was peaceful.

A temporary restraining order was issued and contempt proceedings were initiated for the violation thereof. The defendants claimed that the business of the plaintiff affected interstate commerce and that the Circuit Court had no jurisdiction.

After a thorough and exhaustive discussion of the historical, legal and philosophical aspects of the congressional enactments and the pronouncements of the various courts, the Michigan Supreme Court pointed out at page 456 that it was clear that in providing for uniform administration of national labor policy, Congress had elected to entrust the difficult and delicate problems involved, problems going to the very heart of our economic system and to the welfare of thousands of our citizens, to the National Labor Relations Board.

> "Such, then," the court said, "was the intent of the framers of the act with respect to the ex parte labor injunction, the alleged violation of which in the case before us, it is asserted, must now be investigated by the trial chancellor and presumably, if violated, punished, 'irrespective of what action is taken by the Supreme Court on the question of jurisdiction over the subject matter of this cause.'
>
> "The procedure urged, would, as a practical matter, mean the end of the federal pre-emption of the field and the utter nullification of clear congressional intent that there be national uniformity of treatment of this complex social and economic problem. National policy would be effectively frustrated by a diversity of opinion as to how far federal regulation extended. If, moreover, regardless of the state court's jurisdiction, its orders are to be obeyed under pain of contempt, obedience there will be, even at the cost of the loss of the strike, as the long history of labor in-

junctions so eloquently attests. The restraining order temporary in name is decisive in reality. We cannot interpret the legislation before us as permitting the restoration to full vigor of the ancient evils described.

* * * * *

"The Board, and only the Board, may obtain injunctive relief, should such be the public interest. We are led to conclude that the state courts are without jurisdiction in the most elementary sense. The order of the court being void for want of jurisdiction over the subject matter, we cannot remit to such court the fruitless task of ascertaining whether or not certain acts of the defendants constituted a 'contempt' of the void order." (Emphasis ours.)

The court then went on to pronounce its judgment at page 457 in the following terms:

"Where, then, as here, the National Labor Relations Act pre-empts the field and exclusive jurisdiction is vested in the National Labor Relations Board, both authority to enjoin within the pre-empted area and to punish for contempt of the null injunction are denied the state by the federal act." (Emphasis ours.)

In the Indiana case, *State ex rel. Taylor v. Circuit Court of Marion County*, decided November 5, 1959, 162 N. E. (2d) 90, the question before the court was whether a restraining order was void for having been issued without strict compliance with the Indiana anti-injunction law.

The court found that the restraining order was in fact issued without compliance with the anti-injunction law of the State of Indiana and held, at page 93:

"Having disposed of the issue of jurisdiction the collateral issue of contempt is readily resolved. *It is well established that a void order cannot be the basis of a citation for contempt.* * * * Hence respondent court

was without jurisdiction to issue the contempt citations * * *." (Emphasis ours.)

The other Texas case, *Ex parte Dilley et al.* 334 S. W. (2d), 425, decided in April 1960, relies upon the second *Garmon* decision, as well as previous pre-emption doctrine cases, in striking down contempt actions against pickets *who acted on advice of counsel*—the lawyer who gave the advice, so far as the report reveals, was not cited.

Dilley and the others cited were officers of a building trades council. They picketed a construction site after advising the contractor that they would do so if the contractor continued to undercut union wage conditions. The employees involved were not union members. They did not have a dispute with their employers.

A temporary injunction was issued against the picketing, which was peaceful. *"The relators sought and obtained legal advice and acting thereon"* they eventually resumed picketing.

Relying upon Garmon and the other pre-emption cases, both federal and state, the court at page 432 held:

> "The District Court of Dallas County was without jurisdiction to issue the injunction * * *. The relators are completely discharged and found not guilty of contempt * * *."

The cases heretofore cited seem to be in accord with the general rule stated in 12 *A. L. R.* (2d) beginning at page 1064. At page 1067 the general rule is stated this way:

> "Subject only to one or two exceptions to be noted later, by an almost unbroken line of authority and unanimous consensus of judicial opinion the rule may be said to be firmly established that a court does not possess the right or power to punish as for contempt a disregard or violation of its order or decree which it

> has rendered without jurisdiction over the subject matter or the parties or without power or authority to render the particular decree or order. Lack of such jurisdiction or power may therefore be raised by the person charged with the contempt for the violation of the order or decree in a collateral proceeding on appeal from a judgment of conviction for contempt or upon an application for habeas corpus to test the validity of the imprisonment for contempt."

In view of the aforegoing authorities it would seem abundantly clear that *even* if a lawyer could be charged with contempt for honestly and in good faith advising his clients as to the substantive law and procedure, *contempt cannot be based on the disobedience of a void order—one issued by a court without jurisdiction over the subject matter.*

II. TO HOLD A LAWYER IN CONTEMPT FOR GIVING HONEST ADVICE NOT ONLY DEPRIVES THE LAWYER OF HIS RIGHT TO FULLY ENGAGE IN HIS PROFESSION BUT DEPRIVES HIS CLIENTS OF COUNSEL.

If lawyers are forbidden to give honest legal advice to clients under pain of being jailed, the net result, of course, is to deprive the lawyer of his right to fully and effectively engage in his profession and to deprive clients of counsel.

We recognize that the States have a right to regulate the practice of law within their respective jurisdictions and have the right to establish the procedure governing litigation in their courts. The States, however, in exercising these rights cannot include areas beyond the jurisdiction of the state courts or disregard constitutional limitations and/or guarantees.

The Ohio decisions do two things: (1) approves the assumption of jurisdiction by the state court to prohibit peaceful picketing and, (2) approves the punishment of

those who dare to seek a legal means to obtain a court hearing.

(a) To Deprive Employees of Counsel Interferes With Rights Granted Under Section 7 of the Act.

The position of the Ohio courts is substantially the same as the one struck down by this Court in *Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951). There the contempt arose out of the violation of an order issued under the Wisconsin Public Utility Anti-Strike Law. The court held that in forbidding strikes the Wisconsin law interfered with rights granted to employees under Section 7 of the Labor-Management Relations Act. The "law of the land" was that expressed in the Act, the court held.

Here the assumption of jurisdiction and the issuance of an injunction prohibiting peaceful picketing by the state court accomplished the same result as did the Wisconsin Anti-Strike Act and raised the question whether rights of the employees under Section 7 were being violated.

Thus there are federal questions involved in the jailing of a lawyer for honestly advising a client who is involved in a matter within an area of federal law which guarantees the clients certain rights. This being true, an examination of just what the lawyer did do and consideration of whether what he did do was, in fact, contempt, is apropos.

(b) Lawyer Did Not "Brashly" Advise or Tell Client to Disobey Order.

After twice within a short time being subjected to the experience of having the trial court fail to carry out assurances given him and after consulting his associate

and reviewing the authorities, and being convinced that the court had no intention of granting a hearing to consider the question of its jurisdiction, the petitioner called the union's regional counsel in Chicago and advised him of the status of the matter (R. 41):

> "* * * I explained to him that though it was possible to file a motion to vacate or a demurrer to the petition, that it was apparent from the action of the court that such a motion would not be set down for hearing in the near future and that even if it were, an adverse ruling, which seemed most likely in view of the court's attitude, would not be a final order and could not be appealed. I then told him that if we were correct on the law that an order of the court was wholly invalid, then the only alternative would be to defy the order of the court in the hopes that Mr. Ragan would file contempt proceedings which would undoubtedly be heard immediately and from which we would instantly appeal to the Court of Appeals to determine the jurisdiction of the court."

This conversation with the Union's Regional Counsel and relaying the decision of the union officials to the local union hall was the only role the petitioner had in the decision to continue picketing to test the injunction. (R. 41.)

Parenthetically, we submit that the foregoing report to forwarding counsel does not constitute "brashly advising his client to disobey an existing court order" as the Ohio Supreme Court characterized the report and advice given (R. 67), nor does it substantiate the finding that the lawyer "told them to disobey the order." (R. 69.)

At the contempt hearing of the union officials on June 1st, after the petitioner had carried out his commitments by producing the four men and stipulating the acts which could constitute contempt, when it became apparent to

the petitioner that the arrangement made the previous day in chambers was not to be concluded, he said (R. 23):

> "Your Honor, it was my understanding that they would be cited for contempt and we would be ready to appeal the ruling—would you just mind telling me—if Your Honor will—"

The court then said he wanted the men to tell him whether they just violated the order or whether they were told by someone to do that. Whereupon, the petitioner said:

> "I can advise the court now that they were told by me."

(c) Admissions by Petitioner Relate Only to Report Given Counsel in Chicago; Out of Context Here.

In answer to the court's inquiry as to whether or not he told them that, the petitioner reviewed with the court exactly what had taken place following his efforts to obtain a hearing; that the entire situation had been explained to the officials in Chicago who in turn made the decision that the men should continue picketing in order that a court test could be made of the jurisdictional question. (R. 23, 24, 25.)

At the conclusion of the petitioner's explanation, this exchange took place (R. 25):

> "The Court: After the injunction was issued, I still say I want to know whether they acted on their own initiative in this matter or whether someone told them to disobey the order of the court.
>
> Mr. Green: I have said, I have already said to the court that they obviously did not act on their own initiative.
>
> The Court: Who did?
>
> Mr. Green: *Well, they were—*
>
> The Court: Who did?

Mr. Green: —*instructed to do so by their superiors in the union* in this case according to their own agreement, after they were advised by counsel that the order was not— (Emphasis ours.)

The Court: That is a contempt of court."

It is not clear from the above portion of the record what the court considered to be the acts of contempt or who was guilty of contempt. It would seem to be safe to assume from what happened subsequently that the court was saying that what the petitioner did, i.e., relating the events of the day to counsel in Chicago and suggesting a possible way to get a higher court's determination of the question of jurisdiction in view of the trial court's adamant refusal to grant a hearing, was contempt of court.

The union men returned to court at 10:00 A.M. on June 3rd, as ordered by the Judge at the June 1st hearing when he said:

"They can either go back to work or they can come in here on Friday morning at 10:00 o'clock and purge themselves of contempt." (R. 25.)

Counsel for the employer at this hearing again offered evidence of the picketing, following which the petitioner was asked what he proposed to do. He told the court that he was resting the case on behalf of the union people inasmuch as they were involved in the criminal proceedings and his clients were not required to testify in such an action.

Whereupon, the court said (R. 27):

"You also advised them to violate an order of the court, too."

To which the petitioner replied:

"I did."

The court then said:

"You did. That may go on to the record, that the attorney appearing for these four defendants having violated the temporary injunction issued by this Court, and that he also advised them now not to take the stand to purge themselves of that contempt. Is that correct?

The petitioner replied:

"I said, Your Honor, that I did not conceive that they could be called in a criminal proceedings to testify against themselves. I believe that this is a quasi-criminal proceedings, and that the law is clear in this matter."

Thereupon the court announced that the petitioner was in contempt. He said:

"All right, now, I will—we will proceed from there. It is very apparent from what you have said here this morning that you are in contempt of court. * * * You stand from what you said here this morning in contempt of court, very definitely."

(d) Administration of Justice Requires Lawyer Be Permitted to Honestly Advise.

A most important question in this case is whether a lawyer must bear censure, imprisonment, financial embarrassment or any other type of punishment at the hands of the court when he has, in good faith, after proper consideration of the status of the law, and with a conscientious interest in the welfare of his client, given advice to his client.

This is not to say that a lawyer may, with impunity, advise a client in a spirit of defiance or capriciously to flout the authority of the court. Nor is it to suggest that he

may do so without regard to the status of the law covering the matter upon which he is called for advice.

But, rather, it is to say that a lawyer, having been retained, having studied his client's problems, having researched the law as regards the problem, and having determined that, as here, in his opinion the court has no jurisdiction and has no intention of hearing that question, has two courses of conduct open to him.

The *first* is to abandon the pursuit of justice for his client.

The *second* course of conduct is, we believe, the correct one. The lawyer tells his client fully the status of the matter. He advises his client as to what may be done under the circumstances. He then represents his client as ably as he can *in the course which the client chooses.* Such conduct by the lawyer should not be condemned.

So have the courts held:

In *In Re: Watts,* 190 U. S. 1 (1902), this Court had before it a Writ of Habeas Corpus in favor of two attorneys, Watts and Sachs.

They had mistakenly arrived at the conclusion that the state court of Indiana which had first obtained jurisdiction over a corporation in receivership had jurisdiction superior to the Federal District Court in a subsequent involuntary bankruptcy action brought against the corporation. After a series of legal maneuvers employed by these attorneys and the state court in an attempt to stop the Bankruptcy Court from acting in the matter, Watts and Sachs were found in contempt by the Federal District Judge.

The Court, by Mr. Chief Justice Fuller, stated at page 28:

> "* * * we decline to entertain the suggestion that members of the bar can be intimidated in the discharge of their duty."

At page 29, in a totally dispositive statement the Court said:

> "* * * the essence of the alleged contempt was that, assuming that action was taken pursuant to the advice of these attorneys, they were liable to condemnation for giving such advice. In the ordinary case of advice to clients, if an attorney acts in good faith and in the honest belief that his advice is well founded and in the just interests of his client, he cannot be held liable for error in judgment. The preservation of the independence of the bar is too vital to the due administration of justice to allow of the application of any other general rule."

and at page 32:

> "They could not be found guilty because they believed and declared their belief that the State Court had jurisdiction and that the District Court had not. Granting that they were mistaken, it does not follow that their mistaken conviction constituted contempt."

The literature of attorney contempt is not great for the reason, we feel, that courts generally are loathe to reduce the efficiency of the Bar through fear. However, almost every case that is reported involving honest actions of lawyers vindicates, as did the *Watts* case, the dignity of the profession.

Examples are *May Hosiery Mills, Inc. v. U. S. District Court*, 64 F. (2d) 450 (1933), where the court stated:

> "We regard it as a somewhat novel proposition of law that parties and their counsel who, though misconceiving their legal remedies, lay, as here, all the facts fully and frankly before the court, should be adjudged in contempt merely because they 'guessed wrong'. We do not conceive that in such a case, punishment of the parties or of their counsel tends to vindicate the dignity of the court."

Caldwell v. The United States, 28 F. (2d), 684:

> "Thus suddenly to punish for conduct of doubtful propriety only where the intent to be insubordinate is not clear, might very well have the result of deterring an attorney of less courage and experience from doing his full duty to his client.",

and, *Schmidt v. The United States*, 115 F. (2d) 394, where the Court of Appeals, 9th Circuit, while recognizing that there might be a technical contempt under the facts therein (attorney advising procurement of affidavits from federal grand jurors who had sworn secrecy regarding matters before the jury), nevertheless reversed a conviction, holding:

> "Guilt in a criminal contempt must be established beyond a reasonable doubt. *Gompers vs. Bucks Stove and Range Co.*, 221 U. S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 34 L. R. A., N. S., 874. Once established the penalty of such a judgment against an attorney is long lived.
>
> "It does not cease with the payment of a fine or with the discharge of a jail sentence, but, being inherent in the judgment, may arise to confront him throughout his professional career."

One of the strongest statements of the right of an attorney to freedom from fear of condemnation for his acts in good faith was laid down by an Ohio Appellate Court. In *Hunt v. State*, 5 O. C. C. (N. S.), 621 (1904), affirmed without opinion, 72 O. S., 643, attorneys had advised the violation of a rule of court which they felt was in derogation of the statute. On appeal from conviction of contempt, the court held:

> "And it seems to us that an attorney ought not to be regarded as in contempt of court, nor his client, if they in good faith believe that a rule in some way circumscribes the rights the law gives them and, thus

believing, proceed by ordinary legal methods to test its validity. And unless there is something very extraordinary about the case, calling upon the court to invoke this extreme course of proceeding to punish them, we regard contempt proceedings as quite inappropriate. *Haines v. Haines*, 35 Mich., 138; *Weeks v. Smith*, 3 Abb. PR. (N. Y.), 211.

"Obviously, an attorney who would refrain from thus proceeding, or who would induce his client to thus refrain, where he was acting in good faith and upon an honest belief that such action was necessary to preserve his client's interests or to maintain his own rights, an attorney who under such circumstances would fail to act, through fear of the consequences either in the way of disfavor upon the part of the judge or punishment by fine or imprisonment, would and ought to be branded as a craven and a poltroon, and he would be quite unworthy of his high commission as a member of the Bar. He would be recreant to the honorable traditions of the Bars of England and America, which bodies have always been in the van in every movement and effort to resist the tyrannical exercise of arbitrary power by government or its agents."

In affirming the decision of the Court of Appeals, the Ohio Supreme Court (R. 67) alludes to a statement made by the petitioner's associate, *not the petitioner*, as though it were a statement of the petitioner's intent to tell his clients to disobey the order of the court. The court, however, did not quote all of the language pertinent to that statement, leaving the inference, we fear, that it was a declaration of defiance by the petitioner. The whole statement was this (R. 40):

"*As our conversation neared its end, my associate told him that* regardless of the prior opinions of the court, respecting the validity of the contract that the court had no jurisdiction over this matter and that he was

forcing us to advise our clients * * * of their rights not to obey the order." (Emphasized portion omitted from court's quote.)

It appears that the above statement was attributed to the petitioner because immediately following the court's quotation (from the offer to prove), it went on to define contempt in this manner (R. 67):

"In its broad sense, contempt is a disregard of, or disobedience to, the order or command of a public authority, legislative or judicial. In its restrictive and more usual sense, contempt comprehends a despising of the authority, justice or dignity of a court; and one is guilty of contempt whose conduct is such as tends to bring the administration of the law into disrespect and disregard or otherwise tends to impede, embarrass or obstruct the court in the performance of its function."

We find no fault with this generalization of what amounts to contempt. However, we do not think the act of the petitioner in reporting the status of the Toledo case to his clients in Chicago and advising them of one possible way to get a court hearing falls within the description of contempt stated by the Supreme Court of Ohio.

(e) Court Decrees Silence or Contempt, Even Though Order is Vulnerable.

After this general description of contempt, the Ohio Supreme Court laid down a rule which, *if it is the law, will reduce the effectiveness of the legal profession to a state of impotency.* (R. 67.) The court said:

"An individual against whom an order of the court is directed may violate such order and properly urge in his defense in a contempt proceeding that the order is void."

The court then went on to say that a lawyer stands in a somewhat different position. "He has a duty", the court said, "to recognize and uphold the orders of the courts as long as the order stands", including, apparently, orders which are void:

> "Consequently", the court said, "*an attorney who brashly advises his client to disobey an existing court order is in contempt of court notwithstanding any vulnerability which may attach to such order.*" (Emphasis ours.)

So then we have this situation: If a lawyer correctly advises his client that an order issued by the court is void, the client may violate the order. The client may properly urge the fact that the order is void in his defense in a contempt proceeding. But if the lawyer gave his client that advice, even though one hundred percent correct, he is in contempt of court. He is denied the right to set up the void order as a defense.

Under the rule laid down by the Ohio Supreme Court, lawyers, even though aware that a court had issued a void order, would be forced into silence, because if they advised their clients of the fact that the order was void, they, the lawyers, would be guilty of contempt. The net result of such a state court rule is to deprive the lawyer of equal protection of law and the client of counsel.

Judge Younger, in his dissenting Ohio Court of Appeals opinion, drew a sharp and decisive distinction between acts of contempt and those acts which are proper. He said (R. 56):

> "In view of the above cases (Judge Younger here was referring to *Grimes and Hauer v. Pollock*, 163 O. S. 372, and *Richman Bros. Co. v. Amalgamated Clothing Workers of America, et al.*, 168 O. S. 560, which give reluctant recognition to the federal pre-emption of interstate labor disputes) and the decisions of the

Supreme Court of the United States upon which they are based, the petitioner, Merritt W. Green II, had a valid legal foundation for his opinion that the Common Pleas Court had no jurisdiction of the subject matter and had a valid arguable issue on the question as to whether or not the restraining order involved herein was void. It was his duty as a lawyer, therefore, in my opinion, to so advise the head of the Longshoremen's Union in Chicago and its general counsel in Chicago and such of the individual defendants as might ask him concerning the same."

In concluding his opinion Judge Younger said (R. 59):

"In my opinion there is a vast distinction between the actions of an attorney who is openly contumacious or rebellious over an order of the court and advises or aids and abets his clients in disobeying it, and the actions of an attorney who has a valid legal ground for believing the order of the court to be void for lack of jurisdiction and advises his client to resist the order, so that, in the orderly administration of justice, the question of the court's jurisdiction may be determined. This is especially so, where, as in this case, the opposing counsel and the court knew what was being done and the reason for it. I could not condone the one and I cannot condemn the other."

"I cannot conscientiously vote to find the petitioner guilty of contempt under these circumstances and I therefore dissent."

III. DUE PROCESS REQUIRES FULL HEARING BEFORE IMPARTIAL COURT.

In passing lightly over the question whether the petitioner was denied due process of law, there is good reason to believe that the Supreme Court "discovered" a way to circumvent the decisions of this Court by basing its decision more on a "point of view" rather than the decided cases.[14]

(a) Ohio Courts Exclude All Defense Testimony; Pre-Determination of Guilt Held Sufficient to Convict.

Both Ohio courts took the position that inasmuch as the petitioner had honestly told the court at the June 1st and June 3rd hearings of the advice he gave his client in

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[14] That the Ohio Supreme Court has a "point of view" relating to Federal vs. State jurisdiction in this area was made clear in the opening and closing paragraphs of the court's decision (also written by Zimmerman, J.) in *Richman Brothers Co. v. Amalgamated Clothing Workers etc.*, 168 O. S. 560 (1959) where the court said:

> "There are thinking citizens in the United States who view with concern and misgiving the steadily growing centralization of powers in the federal government and its agencies, and the alacrity with which those powers have been assumed and exercised. Noticeably, the several states are becoming less and less important in the over-all governmental scheme as they have either voluntarily or by compulsion relinquished prerogatives and transferred duties which were formerly theirs."
>
> * * * * *
>
> "In view of the sweeping decisions of the Supreme Court of the United States applying the National Labor Relations Act in a variety of circumstances, including those similar to the one existing here, *we can discover no other alternative than to affirm the judgment of the Court of Appeals.* If we are wrong in our conclusion, the Supreme Court of the United States, as our superior in a matter of this kind, may be afforded the opportunity of telling us so." (Emphasis ours.)

The judgment the court felt it was forced to affirm was one reversing a peaceful picketing injunction.

Chicago, a subsequent hearing was not necessary. The Ohio courts held that the lower court could take judicial notice of what took place at the hearings when the union members were on trial for contempt of the injunction order. Therefore, the courts held, no hearing or trial was necessary in the proceedings involving the petitioner after the filing of charges.

Even though the Court of Appeals went so far as to infer that in telling the court the truth the petitioner could be in direct contempt, the Common Pleas Court did consider the advice the petitioner gave his client as indirect contempt and for that reason filed written charges as provided in Sections 2705.02 and 2705.03 of the Revised Code of Ohio. (R. 29.)

The Supreme Court of Ohio apparently felt that the question of due process was hardly worth noticing even though the entire record of what took place on June 7th was brought to its attention. The court covered the whole due process question in one paragraph of its opinion in which it said (R. 69):

> "As to the hearing had on such charge on June 7, 1960 it was not conducted with the decorum and restraint it should have been, but to say it was of such a character as to deny appellant due process of law is hardly justified. The contempt had already occurred as disclosed in the hearing on June 1st and 3rd, and the Judge presiding over that hearing was the same Judge who issued the restraining order and who conducted the proceedings on June 7th."

Thus the Ohio Supreme Court holds that by reason of the predetermination of guilt, guilt determined at a hearing where the petitioner was not a party, a further hearing on June 7th was unnecessary. The court agreed with the Court of Common Pleas that the petitioner was not en-

titled to a trial or hearing and that the only thing before the court that day was the junishment to be meted out to the petitioner.

The material part of the June 7th proceedings revealing the predetermination of guilt by the court, the refusal of the court to grant a hearing or a trial, the refusal to permit the petitioner to testify, and the adamant position of the court that the petitioner was in court only for the purpose of being sentenced for guilt previously determined, begins at page 33 of the record:

"Mr. Green: Now, may I ask of the court what is conceded to be the posture of this case today?

The Court: He is in contempt of court, I told you.

Mr. Green: Has the court already—let me ask it this way—are we—is my client here only for the purpose of being sentenced for contempt that the court alleges that was found in him?

The Court: That is correct, Mr. Green.

Mr. Green: Well, then as I understand it, the only thing is is up here for his defense—

The Court: That's right; he is in contempt of court. I told him that repeatedly.

Mr. Green: Well that—

The Court: But he disregarded it.

Mr. Green: I want to know what is the procedure then, I want to know what procedure to follow.

The Court: The procedure is he is here in contempt of court. The court must punish him for contempt of court. I take it that you have consulted the courts on this matter earlier; I take it you have read the Supreme Court decisions on matters of contempt; I know your son didn't. I thought maybe you might.

Mr. Green: The only thing I am trying to find out, what are we here for today?

The Court: I repeatedly told you.

Mr. Green: Are we for hearing or trial or what?

The Court: You are not here for any hearing or trial.[15] You can not challenge the jurisdiction of this Court; that is gone, but you are here only on one thing, Mr. Green, and it must be clear to you that the court issued an order on May twenty-seventh and that order was disobeyed.

* * * * *

Mr. Green: So, prior to sentencing, in view of the fact that the court has already found him in contempt—[15]

The Court: That's right—

Mr. Green: In mitigation, that is all I can say, I am going to ask the respondent to be sworn, put under oath, and I think he has that right.

* * * * *

Mr. Green: And tell for the record under oath exactly what transpired from the very beginning of this case. I think he has that right, Your Honor, and I as counsel believe I have that right to speak on his behalf, or he can himself—and I will repeat exactly what he would testify to you under oath. I am asking that privilege so that the upper court will have before it all the facts pertaining to what—whether or not there was a request to dissolve this restraining order or whether the court's jurisdiction was not officially challenged and whether or not this Court could not—did not refuse and has refused right to this day to give us a hearing.

The Court: Oh, please, Mr. Green, don't follow in the same channel.

Mr. Green: I am not following in the same channel. I am asking the privilege of putting the respondent on the stand—[15]

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[15] Sec. 2705.05 Ohio Revised Code: "upon the day fixed for *the trial* in a contempt proceeding *the court shall investigate* the charge, *and hear any answer or testimony which the accused makes or offers. The court shall then determine* whether the accused is guilty of the contempt charge * * *." (Emphasis ours.)

The Court: No. The courts have made the pronouncement on that.

Mr. Green: I would—

The Court: You are too late for that. You are too late.

Mr. Green: I understand that the court is refusing counsel for the respondent and the respondent the right to any mitigation, because you have already found him in contempt? [15]

The Court: That's right.

Mr. Green: Without further hearing, without a trial. That you are refusing to let either counsel or the respondent show or say for the record in mitigation to this Court, everything that transpired—

* * * * *

Mr. Green: I would like to ask the court to answer that question; it is important.

The Court: I have told you that he is in contempt of court, repeatedly, in contempt of court, because he has stood before this Court on two or three occasions and told this Court that he was violating it and his clients were violating the order of the court.

* * * * *

Mr. Green: You mean to tell me that you are forbidding us to put into the record everything that transpired so that a higher court could determine the fact, whether a lawyer is guilty of contempt of court, whether he acted in a manner that was contemptuous?

The Court: Mr. Green, there is nothing before this Court on the theory that you now advance.

Mr. Green: But it has to be before the court, Your Honor.

* * * * *

Mr. Green: Yes; that is why we want to put it in the record because you see it would be hard to perfect

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[15] Footnote previous page.

an appeal—"At about 9:30 A. M. on the 27th day of May, 1960, I received a telephone call from Mr. Ed Doherty, Port Agent for the Seafarers International Union in Toledo who inquired as to whether I would be available to represent the I. L. A. in their labor dispute with the Toledo Marine Terminal."

The Court: This is the attorney, I understand, talking in their office, is that right?

* * * * *

Mr. Green: I am putting in the record what he would testify—

* * * * *

Mr. Green: This is being put in the record by way of an offer to prove because the court has refused to let us put it in otherwise.

The Court: I don't want the record cluttered up with a lot of irrelevant things which has no value to anybody, completely and wholly outside the point in question.

Mr. Green: Well, this is being offered in the nature of making up the record in view of the court's ruling that we have no right to put it in and we certainly have a right to preserve our record."

* * * * *

Following the reading into the record the testimony the petitioner would have given had he been permitted to testify, there was a discussion between the court and counsel for the petitioner, during which counsel suggested that if all the circumstances arising before and leading up to the advice the petitioner gave his clients was to be excluded from the contempt hearing, then the only thing left was for the court to complete what the court had already decided was the only thing before the court that day—punishment of the petitioner, to which the court responded—"That's right. At last you have arrived at the conclusion. That's all that's before the court." (R. 45.)

(b) Trial Court Ignores All Standards of Due Process Set by This Court.

After considering those facts from the record the question is: was the petitioner accorded due process of law in accordance with the standards which have been established by this Court?

In *Ex Parte Bradley*, 7 Wallace, page 364 (1868) a lawyer was disbarred because of a claimed contempt which was characterized as gross misbehavior in his office as an attorney generally. The lawyer and the Judge engaged in violent arguments throughout a trial. Later a citation was issued which ordered Bradley to show cause why he should not be punished for contempt of court.

Headnote two of the case says:

> "An attorney cannot be disbarred for misbehavior in his office as attorney generally, on the return of a rule issued against him for contempt of court, * * * without opportunity of a defense or explanation to the first named charge."

Due process, the court held, required that the lawyer be given an opportunity to be heard on the charge for which he was disbarred—the contempt.

In *Hovey v. Elliott*, 167 U. S. 409 (1897) the court said:

> "A court possessing plenary power to punish for contempt, unlimited by statute, has not the right to summon a defendant to answer, and then after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without hearing, on the theory that he has been guilty of a contempt of court."

Simon v. Craft, 182 U. S. 427 (1901) was a case where it was claimed that an Alabama court had denied the petitioner due process in failing to permit her to attend a lunacy hearing. Out of that case came this rule:

> "The essential elements of due process of law are notice and opportunity to defend, and in determining whether such rights are denied, the court is governed by the substance of things and not by mere form."

In *Jordan v. Massachusetts*, 225 U. S. 167 (1912) a juror in a case where the defendant was convicted and sentenced to death became insane after the verdict. A judicial inquiry disclosed that the juror was of sufficient mental capacity during the trial to act. This Court at page 174 said:

> "Subject to the requirements of due process of law, the states are under no restriction as to their methods of procedure in the administration of public justice."

and at 176:

> "Due process implied a tribunal both impartial and mentally competent for a hearing; * * *."

also at page 176 the Court pointed out that state courts must, however, provide an opportunity for hearing.

Providing an opportunity for a hearing, we submit, means more than providing by statute that a hearing be scheduled and means more than giving notice of a hearing and calling the court to order. Due process, we suggest, contemplates the right to give testimony and to call witnesses, as was not done in the petitioner's case. It also contemplates a trial by a court that has not predetermined guilt.

Ohio does provide by statute for the procedure to be followed in charging contempt and for the hearing on the

charge filed.[16] However, the fact that there is such a statute is of no consequence if the court denies the person so charged a complete hearing before guilt is determined.

As we have already said, the Ohio statutes did not deny the petitioner due process. It was in ignoring the positive requirements of the statute, and otherwise, that the petitioner was denied due process in that (1) he was found guilty in a proceedings where he was not a party but was serving as counsel; (2) charges of indirect contempt were filed against him *after* he had been found guilty of contempt; (3) on the day fixed for trial, the court did not investigate the charge but in fact refused to hear any answer or testimony which the petitioner offered; (4) in view of the court's pronouncement that there would be no trial or hearing, the petitioner was deprived of the right to call witnesses who were present to testify; (5) the statute provides that it is only after the court hears testimony, including that of the accused, that the court shall determine guilt.

In *Riverside and Dan River Cotton Mills v. Menefee*, 237 U. S. 189 (1915), this Court said, at page 103:

> "That to condemn without a hearing is repugnant to the due process clause of the 14th Amendment needs nothing but the statement."

In *Hebert v. Louisiana*, 272 U. S. 312 (1926) the petitioner was convicted of bootlegging. He claimed double jeopardy. At page 316 the Court said the 14th Amendment requires—

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[16] Section 2705.05 of the Ohio Revised Code provides for the procedure to be followed in cases arising under 2705.02 and 2705.03. It provides:

> "On the day fixed for the trial in a contempt proceeding *the court shall* investigate the charge and *hear any answer or testimony which the accused makes or offers.*"
>
> "*The court shall then determine* whether the accused is guilty of the contempt charged." (Emphasis ours.)

"That state action, whether through one agency or another, shall be consistent wtih the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'the law of the land.' "

"Those principles are applicable alike in all the states and do not depend upon or vary with local legislation."

In *Buchalter v. New York*, 319 U. S. 427 (1943) the Court citing *In re: Kemmler*, 136 U. S. 436, 448; *Caldwell v. Texas*, 137 U. S. 692, 697; *Hebert v. Louisiana*, 272 U. S. 312, 316; and *Lisenba v. California*, 314 U. S. 219, 236; *Moore v. Dempsey*, 261 U. S. 86; *Powell v. Alabama*, 287 U. S. 45; *Brown v. Mississippi*, 297 U. S. 278; *Avery v. Alabama*, 308 U. S. 444; among others, at page 429 said:

"The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of civil and political institutions, which not infrequently are designated as 'the law of the land.' Where the requirement has been disregarded in a criminal trial in a state court, this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee."

In *Fay v. New York*, 332 U. S. 261 (1947) at page 288, citing *Palko v. Connecticut*, 302 U. S. 319, 327; *Mooney v. Holohan*, 294 U. S. 103, and *Moore v. Dempsey*, 261 U. S. 86, the court said:

"This court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, but not a sham or pretense."

After referring to *Tumey v. Ohio*, 273 U. S. 510, the Court pointed out that a trial must be held before a Judge

not biased by an interest in the event, and then at 294 said this:

> "The function of this Federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ."

The 14th Amendment, the Court said, requires conformity to standards of fundamental fairness that have won legal recognition.

Another of the important cases decided by this Court in a somewhat parallel situation to the one of petitioner is that of *Cooke v. United States*, 267 U. S. 517 (1929) where the court held that even though knowledge of the alleged contempt be acquired from the confession of the accused, those facts would not justify conviction without a trial in which there was an opportunity for a defense. At page 537 the court said:

> "Due process of law, therefore, in the prosecution of contempt, except that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if desired, and the right to call witnesses to give testimony relevant to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty being imposed."

The lower court in the *Cooke* case proceeded on the theory that the admission by the petitioner, a lawyer, that he had written a letter to the court in which he expressed bitter criticism of a decision rendered by the court, foreclosed evidence or argument. This Court said at page 538:

> "That in cases like this, where the intention with which acts of contempt have been committed must neces-

sarily and properly have important bearing upon the decree of guilt and penalty which should be imposed, the court cannot exclude evidence in mitigation. It is a proper part of defense."

In 1948 this Court again considered this question in *In Re: Oliver,* 333 U. S. 257.

There the petitioner appeared as a witness before a Michigan Circuit Judge who was then conducting a secret one-man Grand Jury investigation of crime. After the petitioner had given certain testimony, the Judge-Grand Jury, acting in the belief that the testimony was false and evasive, summarily charged him with contempt, convicted him, and sentenced him to sixty days in jail.

At page 273, after holding that failure to afford the petitioner a reasonable opportunity to defend himself was a denial of due process of law, the court said that a person's right to a notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; that these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and be represented by counsel.

The court, referring to *Cooke v. United States,* 267 U. S. 517, *supra,* went on to say this (page 275):

"* * * due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses in his behalf, either by way of defense or explanation."

The Court then pointed out that the narrow exception to these due process requirements includes only charges

of misconduct, in open court, in the presence of the Judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent "demoralization of the court's authority" before the public.

The court, at page 278, restated a familiar rule of law which it had previously stated in *Chambers v. Florida*, 309 U. S. 227:

> "It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."

Then in 1955 this Court further elaborated upon the essential elements of due process as laid down in *Cooke v. United States*, 267 U. S. 517, and *In Re: Oliver*, 333 U. S. 256, in the case of *In Re: Murchison, et al.*, in 349 U. S. 133.

This was another one-man Grand Jury proceeding coming out of the State of Michigan. The Judge who was serving as the one-man Grand Jury, after hearing testimony from two witnesses, cited Murchison, a police officer, for contempt. Later, the same Judge, after a hearing in open court, adjudged Murchison guilty of contempt.

The question before the court in *Murchison*, page 134, was whether a contempt proceeding conducted in accordance with the standards used complied with the due process requirement of an impartial tribunal where the same Judge presiding at the contempt hearing had also served as the "one-man Grand Jury" out of which the contempt charges arose.

In deciding *Murchison* the court pointed out that the question before the court did not involve the powers of

courts summarily to punish certain conduct occurring in open court.

At page 136 the court said:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome."

In pointing out that that interest cannot be defined with precision, the court quoted from *Tumey v. Ohio*, 273 U. S. 510, 532, where it said:

> "Every procedure which would offer a possible temptation to the average man as a Judge * * * not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law."

Then the court went on to point out that a Judge who accuses one charged with contempt cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused (page 137) and while the Judge may not have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.

> "Fair trials," the court said, "are too important a part of our free society to let prosecuting Judges be trial Judges of the charges they prefer."

Weighing the pronouncements of this Court against the facts in the record relating to the June 7th proceeding, the inescapable conclusion is that the petitioner was deprived of his liberty without due process of law and was denied equal protection of the law.

CONCLUSION.

In view of the foregoing facts and authorities, we earnestly suggest that the lawyer here did not contemptuously, brashly or irresponsibly advise, counsel, order, tell, or instruct his clients to disobey, ignore or violate a *lawful* order of the Court of Common Pleas.

What he did do was refuse to abandon his clients and their rights under law. Being convinced, and correct in his convictions, that the court had been duped by the plaintiff into believing that the action filed was within the court's jurisdiction, this lawyer diligently and properly continued his quest for justice for his clients, as was his duty.

It is obvious too, that an attempt was being made to "use" the power of the Court to break a strike then in progress. We say this for the reason that the assumption of jurisdiction by the Court because of "Detroit hoodlums" had to be inspired by counsel for the plaintiffs. (R. 38, 40.)

We say in all frankness that if the Court of Common Pleas was in any way offended against, it was not by reason of any act of the petitioner but was the result of being misled by the plaintiff. If anyone has been in contempt of court in contemplation of law, and we think no one has, but if anyone has been, it would be only those who prevailed upon and misled the Court into an area where it had no legal right to exercise its judicial powers.

We sincerely and firmly believe that the petitioner should be discharged from custody and recover all his costs. The many reasons hereinbefore set forth establish

that detention has been and any continuance thereof would be unlawful.

Respectfully submitted,

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